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Criminal Forfeiture / Proceeds / Joint and Several Liability

- **Fourth Circuit holds that defendant must forfeit gross proceeds of drug offense, not net profits.**
- **Amount defendant is required to forfeit includes drug proceeds distributed to co-defendant.**

Defendant was convicted of operating a continuing criminal enterprise under 21 U.S.C. § 848. The district court calculated that Defendant had received $1,252,700 from the drug transactions, including Defendant's one-half share of a particular transaction in which he participated jointly with a co-defendant. The court excluded from its calculation the one-half share ($236,650) received by the co-defendant. The court then deducted from its calculation the Defendant's costs in engaging in the drug business, and ordered Defendant to forfeit only $395,670, which represented his net profit.

The government objected to the forfeiture calculation and appealed the forfeiture order on two grounds: 1) because section 853(a) authorizes forfeiture of gross proceeds, not net profits, the deduction for the cost of engaging in the drug business was error; and 2) because defendants in criminal forfeiture cases are jointly and severally liable for the amount subject to forfeiture, it was error to exclude the $236,650 representing the co-defendant's one-half share of a particular drug transaction. The **Fourth Circuit** agreed with the government on both points and directed that the Defendant forfeit the full $1,489,350.

On the first point, the court held that both the plain meaning of the term "proceeds," as used in section 853(a)(1), and the legislative history of that provision made it clear that Congress intended to authorize the forfeiture of gross proceeds, not net profits. Most important, the court noted that when Congress amended section 853(a)(1) in 1984 to replace "profits" with "proceeds," it stated that "it should not be necessary for the prosecutor to prove what the defendant's overhead expenses were."

Moreover, the court held that sound policy considerations supported the broad interpretation of "proceeds." "The proper measure of criminal responsibility generally is the harm that the defendant caused, not the net gain that he realized from his conduct." Thus, the forfeiture should be measured by the amount of the harm, not the amount of the gain. If it were otherwise, the government could not forfeit anything from a drug dealer who, despite conducting

numerous drug sales, never earned a profit because of inefficient business practice. "The purpose of forfeiture," the court said, "is to remove property facilitating crime or property produced by crime -- *all of which* is tainted by illegal activity" whether the criminal earns a profit or not. (Emphasis added).

Finally, the court held that even if section 853(a)(1) applied only to net profits, the gross amount would be forfeitable under section 853(a)(2). That section authorizes the forfeiture of any property used, or intended to be used, to commit or facilitate the criminal offense. "Because the amounts [Defendant] spent to buy and transport marijuana were used to `facilitate' his criminal enterprise, section 853(a)(2) subjects those amounts to forfeiture." *See United States v. Rogers, infra.*

With respect to Defendant's liability for the portion of the proceeds realized by his partner, the court explained the reasons why a criminal defendant is jointly and severally liable for the entire amount subject to forfeiture. "Just as conspirators are substantively liable for the foreseeable criminal conduct of a conspiracy's other members [citing *Pinkerton*], they are responsible at sentencing for co-conspirators' [acts in furtherance of jointly undertaken criminal activity.]" Criminal forfeiture, of course, is an element of the defendant's sentence. *See United States v. Libretti*, 116 S. Ct. 356 (1995). "Therefore it follows that conspirators should be liable under section 853 for their drug partnership's receipts." *SDC*

United States v. McHan, ___ F.3d ___, 1996 WL 692128 (4th Cir. Dec. 4, 1996). Contact: AUSA Fred Williams, ANCWC01(fwilliam).

Comment: The Fourth Circuit's decision on the gross vs. net issue is particularly important in light of recent district court decisions holding that "proceeds" is limited to net profits, even in drug cases. *See United States v. McCarroll*, 1996 U.S. Dist. LEXIS 8975 (N.D. Ill. Jun. 19, 1996) (heroin dealer given credit for cost of heroin sold); *United States v. 122,942 Shares of Common Stock*, 847 F. Supp. 105 (N.D. Ill. 1994) (defendant in fraudulent securities deal permitted to deduct the amount invested in the scheme from the amount subject to forfeiture). *SDC*

Criminal Forfeiture / Burden of Proof / Facilitating Property / Illegal Seizure

- ❒ **First Circuit holds that burden of proof in criminal forfeiture cases is preponderance of the evidence.**
- ❒ **Property offered by defendant as collateral for marijuana to be received on consignment is forfeitable as property intended to be used to commit or facilitate the offense.**
- ❒ **Illegal seizure of property does not bar criminal forfeiture based on independent evidence.**

Defendant and co-defendant agreed to buy marijuana from an undercover agent. The agent agreed to "front" the marijuana to Defendant who agreed to pay for it with the proceeds he earned from selling it. To secure his promise to pay, Defendant offered to post a diamond, some gold coins, and a motor home as collateral. After the agreement was reached, but before the marijuana was delivered or any collateral changed hands, Defendant was arrested.

Defendant was charged with conspiracy to possess marijuana with intent to distribute under 21 U.S.C. § 846. The indictment contained a criminal forfeiture count under section 853 that sought forfeiture of the diamond, gold coins and motor home as well as the ranch on which those items were stored and where the meetings involved in the conspiracy took place. Following a jury trial, Defendant was convicted and the above items were forfeited.

On appeal, Defendant challenged the forfeitures on three grounds. First, he argued that the burden of proof for criminal forfeiture should be "beyond a reasonable doubt," not "preponderance of the evidence." But the **First Circuit** held that the preponderance standard applied. Under the Supreme Court's decision in *Libretti* v. *United States*, the court said, criminal forfeiture is an aspect of the defendant's sentence "akin to a jail sentence or a fine." Thus, it "lacks the historical and moral roots that have led to a higher proof requirement for a finding of criminal guilt." Any risk that the jury could be confused by instructions containing two different standards of proof -- one for the guilt of the defendant, and one for forfeiture -- is alleviated by bifurcating the criminal trial.

Second, Defendant argued that the forfeited property was not "used or intended to be used . . . to commit or to facilitate" the drug offense, as section 853(a)(2) requires. In particular, he argued that the diamond, coins and motor home had been mentioned but were never actually used to do anything. But the court held that the term "used or intended to be used" should be construed broadly to include not only the real property where the conspiracy was planned, but also the items that Defendant intended to post as collateral for the marijuana that he intended to possess and distribute. While these items, unlike the real property, may not have been used by the conspirators to reach the agreement between themselves, they were intended to be used to carry out the object of the illegal agreement.

Finally, Defendant argued that the diamond and gold coins had been illegally seized during a search incident to his arrest. But the court held that it was unnecessary to resolve that issue because an illegal seizure would not bar criminal forfeiture of Defendant's property if the forfeiture could be supported by independent evidence.

SDC

United States v. Rogers, ___ F.3d ___, 1996 WL 726841 (1st Cir. Dec. 23, 1996). Contact: AUSA Patrick Hamilton, AMA01(phamilto).

Comment: The notion that an illegal seizure of tangible property does not preclude the forfeiture of that property is well-establish in civil forfeiture law. *See United States v. One Parcel Property . . . Lot 85*, ___ F.3d ___, 1996 WL 654445 (10th Cir. Nov. 12, 1996); *United States v. Real Property . . . 20832 Big Rock Drive*, 51 F.3d 1402 (9th Cir. 1995); *United States v. A Parcel of Land (92 Buena Vista)*, 937 F.2d 98 (3rd Cir. 1991), aff'd on separate issue 507 U.S. 111 (1993). But this may be the first case to apply this principle to criminal forfeiture.

On the burden of proof issue, the First Circuit joins virtually all other circuits in holding that the preponderance of the evidence standard applies to criminal forfeiture. The lone holdout is the Third Circuit, and even there only in RICO cases. *See United States v. Voight*, 89 F.3d 1050 (3rd Cir. 1996) (preponderance standard applies to drug and money laundering cases but not RICO cases). This case, however, is the first appellate decision to base its analysis on *Libretti*. *SDC*

Right to Counsel / Administrative Forfeiture / Excessive Fines

- **Tenth Circuit holds there is no right to counsel in civil forfeiture proceedings.**

- **Forfeiture of money, equipment and vehicle from premises where drug activity was taking place does not violate the Excessive Fines Clause under *any* possible test of excessiveness.**

Claimant was convicted of manufacturing, possessing and distributing methamphetamine. At the time of his arrest, federal and state agents seized laboratory equipment, $16,150 in currency, a loaded .357 revolver, a vehicle, and controlled substances including marijuana, methamphetamine and 2 kilograms of precursor chemicals. All items were seized from the place where the drug manufacturing activity was taking place.

State authorities judicially forfeited the vehicle while DEA administratively forfeited the other items. Claimant filed no claim in the forfeiture proceedings until after his conviction when he belatedly filed a Rule 41(e) motion seeking the return of the seized property. The motion raised due process objections to the administrative forfeiture proceedings and various other claims including right to counsel in civil forfeiture cases, double jeopardy, and violation of the Excessive Fines Clause of the 8th Amendment. The district court denied the motion on the ground that the administrative forfeiture was procedurally valid, and Claimant appealed.

The **Tenth Circuit** agreed that once an administrative forfeiture proceeding is complete, the court should not reach the merits of any challenge to the forfeiture under Rule 41(e) that could have been raised by filing a claim and cost bond in accordance with the customs laws. That is because Rule 41(e) does not apply when the claimant has an adequate remedy at law. Accordingly, courts will entertain challenges to administrative forfeitures only if the court first finds that there was a due process violation in the administrative forfeiture proceeding.

In this case, the appellate court found that the record was insufficient to allow it to find that the administrative forfeiture was procedurally adequate. Claimant conceded that he had received notice of the forfeiture proceeding, but he argued that his due process rights were nevertheless violated because he had not been given access to paper and postage stamps necessary to filing his claim. Because it found this assertion "unlikely, but not inconceivable," the court decided to assume that a due process violation occurred and turned to the merits of the claim.

With respect to the right to counsel argument, the court joined several other circuits in holding that civil forfeiture actions should not be deemed criminal in nature for purposes of the Sixth Amendment. The right to counsel under the Sixth Amendment, the court held, is limited to the risk of loss of liberty. Because imprisonment is not authorized by the civil or administrative forfeiture statutes, the Sixth Amendment right to counsel does not apply.

With respect to the excessive fines argument, the court noted that there are a variety of possible tests of excessiveness that could be applied to this case. (In *United States v. 829 Calle de Madero*, ___ F.3d ___, 1996 WL 654444 (10th Cir. Nov. 12, 1996), the Tenth Circuit held that any of the excessiveness tests adopted by other courts might be applied to an Eighth Amendment challenge, depending on the facts of the case.) But it held that it was not necessary to select a test and perform an Eighth Amendment analysis in this case. Because the currency, laboratory equipment, gun and vehicle were all seized from

the premises where the criminal activity transpired, "the forfeitures at issue . . . could not be deemed excessive under *any* rule applying the Eighth Amendment's prohibition of excessive fines to forfeitures." (Emphasis supplied.)

Finally, the court summarily rejected the double jeopardy challenge as foreclosed by *United States v. Ursery*, 116 S. Ct. 2134 (1996). *SDC*

United States v. Deninno, ___ F.3d ___, 1996 WL 734113 (10th Cir. Dec. 24, 1996). Contact: AUSA Mary M. Smith, AOKW01(msmith).

Comment: The general rule is that if a court finds that an administrative forfeiture was procedurally deficient, it will vacate the forfeiture and allow the claimant to file a claim and cost bond. This allows the civil forfeiture case to go forward in the normal way. *See United States v. Woodall*, 12 F.3d 791, 793 (8th Cir. 1993). In this case, perhaps because it knew that it would reject the claimant's objections to the administrative forfeiture on the merits, the court short-circuited the process by moving directly to the merits after finding that the administrative forfeiture could have been procedurally deficient. That procedure was harmless in this case, but the government should object to that procedure in any case where it is necessary to develop the record in a judicial forfeiture proceeding in order to respond to the claimant's objections on the merits. *SDC*

Excessive Fines

❒ District court in Illinois holds that the "instrumentality" test of excessiveness applies in the Seventh Circuit.

Local police arrested the claimant for engaging in multiple drug transactions with a confidential informant at his residence. A search of the residence yielded cocaine and marijuana, $60,000 in currency, scales and other paraphernalia, and ammunition for firearms. While local authorities pursued criminal charges against the claimant, the United States filed a civil forfeiture action against the residence pursuant to 21 U.S.C. § 881(a)(7). When the government moved for summary judgment, the claimant responded that the forfeiture of his residence would violate the Excessive Fines Clause of the 8th Amendment.

The claimant argued that the court should consider a number of factors in its 8th Amendment analysis, including the value of the property in comparison with the value of the drugs sold, and the impact of the forfeiture on the claimant's minor children. The court acknowledged that these factors have been included in the excessive fines analysis by other courts, but it held that the test in the Seventh Circuit is the "incidental and fortuitous" test of *United States v. Plescia*, 48 F.3d 1452 (7th Cir. 1995), *i.e.* a forfeiture is not excessive unless the connection between the offense and the real property

is incidental and fortuitous. *Id.* at 1462. That test, the court said, is "akin to an 'instrumentality' test that focuses on whether the real property was an instrument of the criminal activity *to the general exclusion of other factors,"* citing *United States v. Chandler*, 36 F.3d 358 (1994) (emphasis added).

The court had no difficulty in determining that the forfeiture of the residence satisfied the "incidental and fortuitous" test. There were 15 drug sales on the property in a 3-month period, indicating that the illegal activities were repeated and ongoing. Moreover, the search of the residence indicated that the claimant stored drugs and "typical tools of the trade" on the premises and was caught flushing some drugs down the toilet, "indicating that an even greater quantity of drugs had been present at the property." From all of this, the court concluded that the claimant had used the property "in an intentional and repeated manner" for illegal purposes, and that therefore the forfeiture was not unconstitutionally excessive.

As for the claimant's proportionality and harshness arguments, the court said that even if they were part of the 8th Amendment analysis under Seventh Circuit law, they would not alter the result. The court agreed that there was a "discrepancy" between the value of the property ($110,000) and the value of the drugs sold ($14,000). But it held that the appropriate comparison was between the value of the property and the maximum allowable fine for the offense.

Finally, as to the effect of the forfeiture on the claimant's children, the court questioned whether the property had provided a safe residence for the children, given the fact that drugs were apparently sold there on a regular basis. In any case, the court concluded that the effect on family members had to be discounted. "Often times claimants will have family members who will be negatively affected by the forfeiture of the claimant's house, and so this fact alone cannot serve to preclude the penalty applicable here." *SDC*

United States v. 5307 West 90th Street, ___ F. Supp. ___, 1996 WL 726425 (N.D. Ill. Dec. 16, 1996). Contact: AUSA Anthony Masciopinto, AILN02(amasciop).

Taxes / Excessive Fines

- **Forfeited drug proceeds cannot be offset, as either a payment on taxes due or a loss deduction, against an IRS assessment for income taxes due on unreported drug proceeds.**

- **The denial of such an offset does not make the forfeiture violative of the Excessive Fines Clause.**

Albert E. King pleaded guilty to narcotics charges and voluntarily forfeited, pursuant to 21 U.S.C. § 881(a)(6), $636,940 in narcotics proceeds. Pursuant to the plea agreement, King filed corrected amended tax returns including the illegal income he had received and had not previously reported. The IRS determined that the Kings had received a total of $705,000 of illegal marijuana money from 1989-1992, including the $636,940. The Kings reserved the right to claim an income tax credit for the $636,940, and the Government stated its intent to oppose such a claim.

The district court ruled that the Kings could not treat the $636,940 as a payment on their taxes, nor should they should be allowed a loss deduction for it, "because of federal drug laws and also public policy against drug trafficking." It reasoned that the Kings simply retained no property rights in the forfeited property even if the FBI turned the $636,940 directly over to the IRS.

The court also rested its conclusion on 21 U.S.C. § 881(e) which provides that forfeited property may be retained for official use or shared, but does not provide that it can be used to satisfy federal tax liability.

The court also rejected the King's argument that the denial of any deduction for the forfeited proceeds is an excessive fine under the Eighth Amendment. It found *United States v. Austin*, 509 U.S. 602 (1993) (holding that a grossly disproportionate civil forfeiture runs afoul of the Excessive Fines Clause) inapplicable because the instant case concerned proceeds whereas *Austin* applies to facilitating property. Presumably, the court reasoned that forfeiture of drug proceeds can never amount to an excessive fine. *BB*

King v. United States, ___ F. Supp. ___, 1996 WL 511694. No. CS-95-0331-JLQ (E.D. Wash. July 2, 1996). Contact: Trial Attorney Paul W. Sharratt, TAX02(psharrat).

Excessive Fines / Restitution / Rule 60(b)

- ❒ **A mere change in the law does not constitute an extraordinary circumstance justifying vacation of a final forfeiture judgment.**
- ❒ **A motion to vacate a civil forfeiture judgment filed eight months after the most recent case supporting movant's argument and four years after entry of the judgment movant seeks to vacate is not filed within a reasonable time.**
- ❒ **The fact that movant has already paid criminal and other fines as well as restitution does not convert a civil forfeiture into an excessive fine.**

Movant pled guilty to three counts of income tax evasion in violation of 26 U.S.C. § 7201 as a result of his failure to report approximately $900,000 he earned from a four-year kickback scheme. The government then brought a civil forfeiture action pursuant to 18 U.S.C. § 981 against $350,000 of the total $900,000 movant illegally earned. Movant agreed to the forfeiture, and final judgment was entered for the government in 1992.

In 1996, movant filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(6) to vacate the civil forfeiture judgment. Movant argued that new case law that had developed since the forfeiture judgment was entered made clear that the forfeiture

violated the Excessive Fines Clause of the Eighth Amendment. The court denied movant's motion.

First, a mere change in the law does not constitute an extraordinary circumstance necessary to justify setting aside a final judgment under Rule 60(b)(6). Second, movant did not make the motion with a reasonable time, as the rule requires. The most recent case movant cited in support of his argument was decided by the Second Circuit in September 1995. Movant filed this motion in May 1996, over eight months after that decision was rendered, and almost four years after the judgment in the civil forfeiture case was entered. Movant gave no explanation for his delay in filing this motion. Accordingly, movant failed to file his motion within a reasonable time.

On the merits, the forfeiture was not an excessive fine. It was not particularly harsh, considering that movant earned at least $900,000 from his illegal activity. It had no effect on an innocent third party. Movant's tax evasion was "an extremely grave offense" for which he could have received a fine of up to $750,000, but for which he was fined only $2,500. Finally, the relationship between the money and the offense was "an extremely close one" because the money represented the proceeds from movant's illegal kickback scheme.

Finally, the court rejected movant's argument that the forfeiture of the $350,000 should be examined in the context of all of the payments he has made as a result of his illegal activities, including his payment to the government of approximately $750,000 in taxes, interest, and penalties, and his payment of $250,000 to his former employer. Even if movant ultimately paid more than what he gained from his illegal dealings, the $350,000 forfeiture is not an excessive fine because paying restitution plus forfeiture "'at worst'" forces movant to disgorge an amount equal to twice the value of the proceeds of the crime. "'Given the many tangible and intangible costs of criminal activity, this is in no way disproportionate to the harm inflicted upon the government and society by the [offense].'" *RMJ*

United States v. $350,000, 1996 WL 706821 (E.D.N.Y. Dec. 6, 1996) (unpublished). Contact: AUSA Arthur P. Hui, ANYE03(ahui).

Probable Cause

❑ **Forfeiture of cash seized in airport stop upheld based on "profile" characteristics plus claimant's history of drug trafficking and lack of legitimate income.**

Claimant and a companion purchased two round trip airline tickets with a large amount of cash, would not produce identification to the ticket agent, and checked no luggage. When questioned by a police officer who had been alerted by the ticket agent, the claimant and his companion each produced identification that did not match the names on the tickets. Claimant explained that, "that's just a name I use when I'm in a hurry." Finally, when asked to empty his pockets, claimant produced $8,800 in cash which the police officer seized.

Subsequent investigation revealed that Claimant had been arrested at least 19 times for drug offenses

and other felonies, and that he had had no legitimate source of income for many years. Based on this evidence, the government filed an action under 21 U.S.C. § 881(a)(6) seeking forfeiture of the money as drug proceeds.

The government moved for summary judgment on the ground that the record clearly established probable cause for forfeiture of the money. Claimant argued that he was detained illegally and that the money was seized in violation of the Fourth Amendment. Therefore, he argued, the fruits of the seizure should be suppressed and could not be considered in determining whether the money should be forfeited. He also argued that the evidence obtained by the police officer at the airport was not, by itself, sufficient to establish probable cause, even if it were admissible.

The district court granted the government's motion for summary judgment. First, the court held that even if the seizure of the $8,800 were illegal, the illegal seizure would not bar the forfeiture action. Illegally obtained evidence is suppressible in a civil forfeiture case, but the property itself does not become immune from forfeiture if the government can meet its burden without using any evidence obtained in violation of the Fourth Amendment.

Next, the court held that none of the evidence obtained up to the point when the $8,800 was seized needed to be suppressed. The information supplied by the ticket agent, and the results of the dialogue between the police officer and the claimant and his companion, were all lawfully obtained. *See Florida v. Bostwick*, 501 U.S. 429, 434 (1991) ("mere police questioning does not constitute a seizure"). Thus the court could consider the amount of cash Claimant was carrying, the use of the cash to purchase the airline tickets, the failure to check any luggage or to produce any photo identification, and the use of false names on the tickets themselves.

Finally, the court held that the government need not demonstrate probable cause until either the forfeiture trial or, as under these circumstances, in a motion for summary judgment. Thus, in determining whether there was a connection between the $8,800 and drug trafficking activity for purposes of the summary judgment motion, the court was entitled to consider not only the events that took place at the airport, but also the claimant's criminal history and lack of legitimate income that could explain his possession of a large quantity of cash. "Although 'profile' factors . . . are of little value when considered in isolation, they are probative when considered with other evidence of narcotics activity." *MML*

United States v. $8,800 in U.S. Currency, ___ F. Supp. ___, 1996 WL 670624 (W.D.N.Y. Nov. 15, 1996). Contact: AUSA Anne Van Graafeiland, ANYWR01(avangraa).

Probable Cause

❒ **Quantity of currency, manner in which it is stored in proximity to drug paraphernalia, and claimant's criminal history and lack of legitimate income establish probable cause for forfeiture of currency seized from residence.**

Upon execution of a search warrant, federal agents recovered three caches of currency totalling $32,100 and drug paraphernalia from the family home of a known drug dealer. The government filed a civil forfeiture action and moved for summary judgment claiming that funds in the amounts of $12,000, $16,000 and $4,100 were subject to forfeiture pursuant to 21 U.S.C. § 881(a)(6). Claimants,

the parents and sister of the dealer, argued that they had a legitimate right to the money. Agents found the $12,000 in a metal box in the attic, the $16,000 (wrapped in bundles with rubber bands) in an open gym bag in one of the bedrooms, and the $4,100 in a dresser drawer belonging to the sister. The court granted summary judgment for the government with respect to the $12,000 and $16,000 but not the $4,100.

The court stated that the government provided sufficient evidence to meet its burden of proof that the $12,000 and $16,000, but not the $4,100, were obtained as a result of illegal drug activity. The arrest of the dealer three times for drug violations, the fact that he had been unemployed for a number of years, and the manner in which the money was tied in bundles and hidden along with drug paraphernalia supported a reasonable belief that he obtained the $12,000 and $16,000 in violation of federal narcotics laws. Moreover, the claimants failed to sustain their burden of proof that the money was obtained from a legitimate source in that they initially stated that they did not know where the money came from or who owned it, and subsequently failed to submit any affidavits supporting their contention that they obtained the funds through employment or other verifiable income.

On the other hand, the evidence presented with respect to the $4,100 did not support forfeiture on a motion for summary judgment. The court based its findings on two points: First, the sister said that a friend gave her the money, which was plausible. Second, unlike hiding cash in an attic or wrapping it with rubber bands in a gym bag, placing $4,100 in a dresser drawer does not give rise to an inference that the money was illegally obtained. Because there existed a genuine issue of material fact that a reasonable jury could find that this money came from a legitimate source, summary judgment was not appropriate. *MML*

United States v. Funds in the amount of Twelve Thousand Dollars ($12,000.00), 1996 WL 717454 (N.D. Ill. Dec. 9, 1996) (unpublished). Contact: AUSA Carole Ryczek, AILN02(cryczek).

Abatement

- ❒ **Civil forfeiture under section 881(a)(6) is not punishment.**
- ❒ **A civil forfeiture does not abate upon the death of the property owner.**

Currency was seized from property owner as drug proceeds. Property owner was then murdered. His estate and his attorney filed claims to the currency. The magistrate dismissed the complaint on the ground that civil forfeiture is punishment and abates upon the death of the property owner. The **Eighth Circuit** reversed, holding that based upon the Supreme Court's decision in *Ursery*, civil forfeitures under section 881(a)(6) are not punishment, and therefore, the forfeiture action does not abate upon death of the alleged property owner. *DAB*

United States v. One Hundred Twenty Thousand Seven Hundred Fifty One Dollars ($120,751.00), ___ F.3d ___, 1996 WL 699761 (8th Cir. 1996). Contact: AUSA Ray Meyer, AMOE01(rmeyer).

Comment: The Fourth and Ninth Circuits have also held that civil forfeitures are not punitive. *See United States v. U.S. Currency in the Amount of $551,527.00*, 1996 WL 612700 (9th Cir. 1996) (Table Case) (reversing judgment of district court dismissing civil forfeiture under 18 U.S.C. § 1955(d)); *In Re One 1985 Nissan*, 889 F.2d 1317 (4th Cir. 1989) (section 881(a)(6) forfeiture). *DAB*

Due Process / Delay in Filing Complaint

❒ **Delay of forty-two months in filing a civil forfeiture action may be justified if the government held the civil case until a related criminal case was completed, and the defendant in the criminal case was a fugitive.**

Claimant corporation moved for summary judgment in a civil forfeiture action asserting that a 42-month delay between the seizure of its property and the filing of the forfeiture action violated due process. The district court considered the four factors set out in *United States v. $8,850*, 461 U.S. 555 (1983), for determining whether delay in bringing forfeiture proceedings is consistent with due process (the length of the delay, the reason for delay, the claimant's assertion of right to a timely hearing, and the prejudice from the delay to the claimant's defense on the merits).

The first factor required little discussion. The court acknowledged that a 42-month delay was substantial. The court thus focused on the remaining factors.

Regarding the reason for the delay, the government asserted that 35 of the 42 months were spent pursuing criminal charges against two corporate officials, one of whom became a fugitive before eventually pleading guilty. Citing *$8,850*, the court held that pending criminal proceedings present justifications for delay in instituting civil forfeiture proceedings, but only if the government has diligently pursued the criminal case. Because the record did not reveal all the circumstances that delayed the plea, the court found that the question of whether the delay was caused by the government's negligence or by the flight of one of the defendants remained unclear.

The court also found the record unclear concerning how vigorously during the delay period the claimant had asserted its right to a timely hearing. Under *$8,850*, a claimant's failure to file an equitable action to compel the filing of a forfeiture action or the return of the property can be an indication that the claimant did not desire an early judicial hearing. The court noted that the claimant had filed no formal action or taken other formal steps to compel a hearing but had contacted the government informally a few months after the seizure to request release of the seized property, which request the government had refused.

Finally, with respect to the prejudice factor, the court acknowledged that during the delay the seized property had depreciated sharply in value, but it focused on whether the "delay had hampered [the claimant] in presenting a defense on the merits." The claimant corporation asserted that it suffered such prejudice as a result of the death of a witness who

had inspected the property for an independent inspection company just prior to the seizure. However, the government pointed out that the claimant had not sought the documents created by the deceased inspector and that another employee of the inspecting company also had been present during the inspection. The court found that, based on this record, it could not conclude that the death of the witness prejudiced the claimant so as to violate due process and justify summary judgment for it.

Having considered the four *$8,850* factors, the court concluded that, although the delay of 42-months and the sharp depreciation in the seized property's value were undisputed, they were not sufficient to warrant summary judgment for the claimant given the genuine issues of material fact to be resolved. The court referred the matter to a Magistrate Judge for further proceedings. *JHP*

United States v. Computer Equipment Valued at $819,026 Seized from Susco International, 1996 WL 684431 (E.D.N.Y. Nov. 20, 1996) (unpublished). Contact: AUSA Charles P. Kelly, ANYE03(ckelly).

Interlocutory Sale / Fair Market Value

❒ **If the government seizes claimant's property and sells it in an interlocutory sale for less than fair market value but then dismisses the forfeiture action, claimant can recover damages.**

The government filed an action for forfeiture of real property pursuant to 21 U.S.C. § 881(a)(6), and moved for an interlocutory sale because the value of the property was steadily decreasing. The district court granted the government's motion and the property was sold at auction for $49,000.00. Subsequently, the government moved to dismiss the forfeiture action and return the proceeds of the interlocutory sale to the claimant. The claimant did not object to the dismissal, but claimed that the property was worth more than $49,000 and that judgment in his favor should not be limited to that amount.

The district court granted the government's motion to dismiss but scheduled a hearing to determine whether the government should have sold the property for more than $49,000.00, entitling claimant to an additional amount of money. The government argued that no hearing was necessary because even if the sale price on the property was too low, the doctrine of sovereign immunity precludes a claimant from receiving damages from the government. The court disagreed, holding that while the doctrine of sovereign immunity usually shields the federal government from lawsuits, it did not under these circumstances.

The court stated that if there is a question as to whether the United States has lawfully disposed of a piece of property, a hearing is necessary to determine if the government's conduct renders it liable for damages. In other words, if the government negligently sold the claimant's property for less than its true market value, it would be liable to the owner because its disposal of the property would not have been lawful. Thus, the court held a hearing to give the claimant the opportunity to show that the government was negligent in selling his property for an amount significantly below its value.

Following the hearing, which consisted largely of the conflicting testimony of property appraisers retained by each party, the court held that the government received at least fair market value for the property. *MML*

United States v. One Parcel Property at Located at 414 Kings Highway, No. 5:91-CV-158 (D. Conn. July 3, 1996). Contact: AUSA Carl Schuman, ACTH01(cschuman).

Double Jeopardy Note

In *United States v. Perez*, 70 F.3d 345 (5th Cir. 1995), the Fifth Circuit held that the civil forfeiture of a vehicle pursuant to 21 U.S.C. § 881(a)(4) constituted prior jeopardy. On November 18, 1996, the Supreme Court granted *certiorari* in *Perez*, vacated the judgment, and immediately remanded the case to the Fifth Circuit "for further consideration in light of *United States v. Ursery*." This is noteworthy because *Ursery* involved only sections 881(a)(6) and (7) and 18 U.S.C. § 981(a)(1)(A), and not section 881(a)(4). The Eighth Circuit has already held that *Ursery* applies to section 881(a)(4) forfeitures. *See United States v. One 1970 36.9' Columbia Sailing Boat*, 91 F.3d 1053 (8th Cir. 1996). *SDC*

Restraining Orders / Substitute Assets

☐ District court in New York holds that Second Circuit precedent *does not* authorize pre-trial restraint of substitute assets, but does allow parties to stipulate voluntarily to such restraint to mitigate hardship.

After Defendant was indicted on RICO charges, the government sought a pre-trial order restraining Defendant's assets and appointing a monitor "to safeguard the restrained assets from dissipation and waste" while the criminal case was pending. The restrained assets included both "traceable" assets and substitute assets. All parties affected by the restraining order consented to it.

The court decided that it first had to determine whether it had the authority, under 18 U.S.C. § 1963(d)(1), to restrain substitute assets pre-trial. The Fourth Circuit holds that such restraint is authorized, but four other circuits hold that it is not. The Second Circuit is generally regarded as having authorized pre-trial restraint of substitute assets in *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988).

See United States v. Bellomo, 96 Cr. 130 (LAK) (E.D.N.Y. Sept. 16, 1996) (*Regan* "inescapably leads to the conclusion that [the Court of Appeals for the Second Circuit] views the pre-trial restraint of substitute assets as permissible.") But the court read *Regan* more narrowly. In the district court's view, *Regan* held only that "there could be no harm to any party in permitting the third parties to voluntarily substitute such other assets for the restrained traceable assets prior to trial." It said "nothing about the power of a court to compel the forcible pre-trial restraint of substitute assets over the asset-holder's objection."

The court then undertook its own review of the statute and the relevant case law and concluded that § 1963(d)(1) authorizes the restraint of traceable assets but not of substitute assets. It held, however, that under *Regan*, the court could enter an order restraining substitute assets if the parties agreed to the restraint as a way of avoid a hardship that would result if the restraining order were applied to traceable property. Accordingly, the stipulated restraining order was entered. *SDC*

United States v. Gigante, ___ F. Supp. ___, 1996 WL 699511 (S.D.N.Y. Dec. 3, 1996).
Contact: AUSA Barbara Ward, ANYS01(bward).

Innocent Owner

❒ **Motel owner failed to demonstrate either lack of knowledge or lack of consent regarding illegal use of her property.**

The government filed an action under 21 U.S.C. § 881(a)(7) seeking forfeiture of a motel that was used to facilitate criminal activity in violation of federal drug laws. Claimants, owners of the motel, in contesting the forfeiture, argued the innocent owner defense -- that they did not know about nor did they consent to the drug activity at their motel.

The district court held that to establish an innocent owner defense, the claimants could demonstrate either a lack of knowledge of the criminal activity or that they took all reasonable actions to prevent it. It ruled, however, that the claimants not only knew about the unlawful activity, but instead of taking steps to prevent it, actually took steps to hinder effective law enforcement and to advance materially the narcotics trafficking in the area.

With respect to the claimant's knowledge, the court found that on any given evening 75 to 100 crack customers could be observed in the motel's parking lot. In fact, the activity was so pervasive that at times persons driving into the parking lot would be immediately approached by persons selling drugs. In light of these facts, the court declined to credit the claimant's testimony that while she was aware that the police made an arrest a day on her property, they refused to tell her why and she remained ignorant of the reason.

Following the rule applied in the Second and Eleventh Circuits, the court held that an owner who has knowledge of drug trafficking activity taking place on his property can avoid forfeiture if he can prove that "every action, reasonable under the

circumstances, was taken to curtail [the] activity." Otherwise, "consent is inferred and the property is subject to forfeiture." In this case, the court found that the claimant had made few phone calls to the police and did not evict drug traffickers. Indeed, persons arrested for drug trafficking were allowed to return; and when police taught the claimant how to avoid renting to traffickers by renting only to persons with luggage and photo ID's, she ignored their advice and even warned tenants when the police were coming. Thus, the claimant failed to establish an innocent owner defense. *MML*

United States v. One Parcel Property at Lot 22, 1996 WL 695404 (D. Kan. Nov. 15, 1996) (unpublished). Contact: AUSA Annette B. Gurney, AKS01(agurney).

Comment: The leading cases holding that a person who knows that his property is being used for an illegal purpose must show that he took all reasonable steps to prevent the activity include the following: *United States v. 121 Allen Place*, 75 F.3d 118 (2d Cir. 1996), *United States v. 1012 Germantown Road*, 963 F.3d 1496 (11th Cir. 1992); *United States v. 152 Char-Nor Manor Boulevard*, 922 F. Supp. 1064 (D. Md. 1996); and *United States v. 5.382 Acres*, 871 F. Supp. 880 (W.D. Va. 1994). *SDC*

Cross Claims

❒ **In a civil forfeiture action, a district court permitted two claimants to file cross claims against a third claimant, and for more assets than were included in the forfeiture action.**

Theresa Fernandez was an investment advisor who defrauded her clients of millions of dollars. Without authority, she wired $16.8 million from an account of Parvus Company, Ltd. one of her corporate clients, to three accounts belonging to her relatives (the Monzon family). The United States sued to forfeit the three accounts pursuant to 18 U.S.C. § 981(a)(1)(A).

Claims were filed by the Monzon family as well as by Parvus and another group of victims, the Del Rosarios. Parvus and the Del Rosarios moved to amend their answers to file cross-claims against the Monzon family. In a surprising departure from the traditional principles of *in rem* forfeiture law, the district court granted their motions.

The court predicated its decision on the 1966 unification of the Civil and Admiralty Rules, which made the Civil Rules applicable to *in rem* actions. Fed. R. Civ. P. 13(g) allows cross-claims "if: (1) it is brought by one party against a co-party; and (2) it arises out of the same transaction or occurrence, or relates to the same property...." The court acknowledged that, although technically the only parties to a civil forfeiture case are the government and the *res*, it felt that the meaning of "party" in Rule 13 must be given a broad enough meaning under the Civil Rules

to treat claimants as parties. It found further support for its broadened construction of "party" by analogy to Fed. R. Civ. P. 24(a), which permits interpleading, and to Fed. R. Civ. P. 14(c), which allows for claims against third-parties in admiralty and maritime cases.

The court determined that, pursuant to the Second Circuit criteria for allowance of cross-claims, there was a close enough nexus in this case to permit cross-claims even though the cross-claims involve funds and transactions other than the specific *res* and transactions involved in the instant action. It perceived a sufficient nexus in that all the arguments in the case involved ownership of various funds. It further reasoned that, although discovery would range beyond the original issue, the entire fraud scheme and knowledge of the Monzon family were relevant to their innocent owner claims, and that it was still possible that some of Del Rosarios' money made it into the defendant accounts.

The opinion did not dispense with the distinction between *in rem* and personal jurisdiction; cross-claimants in a forfeiture action must still show that they established personal jurisdiction over the cross-claim defendants. The court ruled, however, that in the instant case all the claimants had waived their objections to personal jurisdiction by not making timely objection to same pursuant to Fed. R. Civ. P. 12(h). To make this finding, the court had to note first that the Supplemental Rules do not specify the time within which a defense of lack of jurisdiction over the person must be raised, concluding that Civil Rule 12(h) therefore controls.

Footnote 10 of opinion contains a "savings clause":

Had the government expressed concern that the lodging of these cross-claims would impede the expeditious enforcement of the federal civil forfeiture statute, that would have weighed heavily in the Court's consideration of this matter. *BB*

United States v. All Right ... in the Contents of ... Accounts at Morgan Guaranty Trust Co., 1996 WL 695671 (S.D.N.Y. Dec. 5, 1996) (unpublished). Contact: AUSA Gary Stein, ANYS02(gstein).

In Rem Jurisdiction / CMIR Forfeiture

- **District court has jurisdiction over the *res* when seized currency is replaced with a cashier's check and given to the USMS for deposit into the Seized Asset Deposit Fund.**
- **Forfeiture under 31 U.S.C. § 5317 is not limited to cases where the U.S. Customs Service is the seizing agency.**

The U.S. Border Patrol seized $46,588 in U.S. currency and $20 in Canadian currency from claimant for failure to file a report declaring the currency as she crossed the Canadian border, as required by 31 U.S.C. § 5316. The Border Patrol notified both the DEA and the U.S. Customs Service of claimant's arrest and delivered the currency to the DEA. The DEA exchanged the currency for a cashier's check at a local bank and then sent the check to the U.S. Marshal's Service for deposit in the Seized Asset Deposit Fund.

Although a Customs agent interviewed the claimant upon her arrest, the DEA initiated administrative forfeiture proceedings against the currency.

After claimant filed a claim and cost bond, the matter was referred to the U.S. Attorneys Office for judicial forfeiture proceedings. The government filed a civil forfeiture complaint against the currency pursuant to 21 U.S.C. § 881(a)(6) and 31 U.S.C. § 5317(c). A warrant of arrest *in rem* was issued directing the U.S. Marshal to arrest the defendant currency. The U.S. Marshal executed the warrant by transferring the currency from the Seized Asset Deposit Fund to its Judicial Seizure Fund. Thereafter, the district court entered summary judgment in the government's favor pursuant to section 5317(c).

On appeal, the claimant argued that the district court lacked jurisdiction over the defendant currency because it was replaced by a cashier's check. Consequently, argued the claimant, the *res* was no longer identifiable. The **Ninth Circuit** rejected this argument stating that the cashier's check was an "appropriate, fungible surrogate for the seized currency." Claimant further argued that the forfeiture should be set aside because the Customs Service did not offer her remission proceedings. The court of appeals found this argument to be meritless because the Customs Service was not the seizing agency, and because the drug forfeiture statute, 21 U.S.C. § 881 incorporates all of the laws and procedures relating to customs seizures, including remission procedures which were offered by DEA.

Finally, the court of appeals found unpersuasive claimant's argument that 31 U.S.C. § 5317(c) can be invoked only pursuant to a customs seizure explaining that nothing in the language of the statute supports such an argument. Accordingly, the Ninth Circuit affirmed the forfeiture under 31 U.S.C. § 5317(c). *MDR*

United States v. $46,588.00 in United States Currency, ___ F.3d ___, 1996 WL 734764 (9th Cir. Dec. 26, 1996). Contact: AUSA Peter O. Mueller, AWAW01(pmueller).

Post and Walk

❒ **In a civil forfeiture action against real property, the property owner is not entitled to pre-seizure notice and hearing if the government merely posts notice of the seizure on the property.**

The United States filed a civil forfeiture complaint under 18 U.S.C. § 981(a)(1)(B) against a parcel of real property and asked the court to issue a warrant for its arrest. The court responded by issuing an order for the United States to show cause why notice and a hearing should not be granted to the property owners as commanded by *United States v. James Daniel Good Real Property*, 510 U.S. 43, 114 S. Ct. 492 (1993). The United States responded to the show cause order by stating that it would merely post a notice of seizure on the property, in accordance with Supplemental Rule E(4)(b). The court issued the warrant of arrest.

The opinion explains that it is unnecessary to seize realty because it cannot abscond. It states: "Sale of the property can be prevented by filing a notice of lis pendens as authorized by state law when the forfeiture proceedings commence." It explains that the warrant issued in this case (quoted in full in the opinion) will provide for seizure and

immediate release of the property, and that if the government wants to take actual possession, there must first be notice and a hearing. *BB*

United States v. Real Property at 286 New Mexico Lane, 1996 WL 732561 (M.D. Fla. Dec. 19, 1996) (unpublished). Contact: AUSA Marie L. De Marco, AFLMO01(mdemarco) or A. Brian Phillips, AFLMO01(bphillip).

Comment: Another case by the same judge on the same issue and reaching same result is report at *United States v. 3284 Brewster Drive*, ___ F. Supp. ___, 1996 WL 732077 (M.D. Fla. Nov. 22, 1996) *BB*

Administrative Forfeiture / Statute of Limitations / Notice

- ❒ **Civil actions for return of seized property must be brought within 6-years of the accrual of the cause of action.**
- ❒ **Date of accrual of cause of action for return of seized property under the Tucker Act or the Federal Torts Claims Act is date that plaintiff knew or had reason to know of the seizure, usually the time of the seizure.**
- ❒ **Date of accrual of cause of action for return of seized property under the Administrative Procedure Act is date that the final administrative forfeiture decision was made.**
- ❒ **Judicial review of administrative forfeiture under the Administrative Procedure Act is limited to whether the agency complied with the notice requirements of procedural due process.**

In April 1987, DEA agents seized $9,020 and $15,000 in cash and two sets of jewelry valued at $28,906 and $2,975 from a drug dealer in connection with his arrest. The drug dealer was subsequently tried and convicted, and in September 1987, was sentenced to 12 years in prison. Meanwhile, DEA commenced administrative forfeiture proceedings against the seized cash and jewelry. In May 1987, forfeiture notices for the cash were sent by certified mail return receipt requested to the dealer's prison and to his last known residence. The cash notices sent to his prison and the notice for the $9,020 to his residence were returned unclaimed. The notice to the dealer's residence for the $15,000 was received in May 1987. The cash notices were also published in *USA Today*. However, the dealer filed no claims for the cash, and both sets of cash were administratively forfeited in April 1988.

In August 1987, forfeiture notices for both sets of seized jewelry were sent to the drug dealer's last known residence, but not to his prison. Notice for the jewelry valued at $28,906 was received in September 1987, but the notice for the jewelry valued at $2,975 was returned unclaimed. The

jewelry notices were also published in *USA Today*. The dealer filed no claim for either set of jewelry and both sets of jewelry were forfeited in April 1989.

In October 1994, the drug dealer moved pro se for return of the cash and the jewelry under Fed.R.Crim.P. 41(e). The court found that, because the criminal proceedings had been completed at the time of sentencing, the drug dealer had no recovery right under Fed.R.Crim.P. 41(e) and that his pro se motion should be construed as a civil complaint under the Tucker Act, 28 U.S.C. § 1346(a)(2) (for property valued under $10,000); the Administrative Procedure Act (APA), 5 U.S.C. § 702; or the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq. However, the court pointed out that the time within which an action against the United States under any of these three statutes must be commenced is governed by 28 U.S.C. § 2401 which requires the filing of such claims within six years after the right of action first accrues.

The government conceded that the claim for the jewelry valued at $2,975 was timely and meritorious and consented to pay that amount. However, the government contested the other claims as time-barred or otherwise unavailable. The court agreed that the claims to the remaining property under the Tucker Act and the FTCA were time-barred under 28 U.S.C. § 2401 because the drug dealer's claim accrued at the time of the seizure, when he knew or clearly had reason to know of the seizure, well over six years before the dealer brought this action.

To the extent that the court construed the dealer's claims as challenging the propriety of DEA's forfeiture proceedings under the APA, the dealer's claims accrued on the dates the final administrative forfeiture decisions were made in April of 1988 and 1989. Consequently, although the challenges to the April 1988 forfeitures were time-barred by the six year limitation of section 2401, the APA challenges to the April 1989 forfeitures were timely. Nevertheless, because judicial review of administrative forfeiture under the APA is limited to whether the agency complied with the notice requirements of procedural due process, the court held that the signed postal receipt showing that the drug dealer received DEA's forfeiture notice for the set of jewelry valued at $29,906 demonstrated that the drug dealer had no viable claim to that jewelry under the APA. *JHP*

Vasquez v. United States, 1996 WL 692001 (S.D.N.Y. December 3, 1996) (unpublished).

Comment: A discussion of the various theories that courts have allowed for contesting administrative forfeitures and the statutes of limitations applicable to them can be found in AFMLS Trial Attorney Gregory A. Paw's article, "Judicial Review of Administrative Forfeitures," *Asset Forfeiture News* (January/February 1996).

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Chief:	Gerald McDowell
Assistant Chief:	Stefan Cassella
Editor/Production:	Todd Blanche
Design:	Elizabeth Kopp